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April 12, 2006

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Interlocutory Order

Name of Case: Personnel Security Hearing

Date of Filing: February 10, 2006

Case Number: TSZ-0295

This Interlocutory Order relates to a proceeding pending before the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) under the regulations codified at 10 C.F.R. Part 710<sup>1</sup> entitled *Personnel Security Hearing*, Case No. TSO-0295.

On October 6, 2005, the Director of the OHA appointed me the Hearing Officer in connection with a request for an administrative review hearing filed by XXXXXXXXXX (the individual) to address the issue of her continued eligibility for a DOE security clearance, Case No. TSO-0295. In accordance with the Part 710 regulations, I conducted a hearing in the case. After hearing eight hours of testimony, I decided to afford Counsel for the individual the opportunity to submit his closing statement in writing and to supplement the record with regard to one specific issue in the case. The individual's Counsel tendered his closing statement and some post-hearing submissions in Case No. TSO-0295 on January 24, 2006. On February 10, 2006, Counsel for the DOE filed a "Motion to Strike Certain Post-Hearing Submissions and Parts of the Individual's Closing Statement." The pending Motion to Strike has been designated as Case No. TSZ-0295 by the OHA.

**I. Background**

**A. The Post-Hearing Submissions Tendered in Case No. TSO-0295**

At the hearing in Case No. TSO-0295, I decided that the individual's Counsel could (1) tender his closing argument in writing, and (2) provide additional documentation regarding the individual's continued rehabilitation efforts from alcohol abuse. *See* Transcript of Hearing (Tr.) at 328. In response to my ruling, Counsel for the individual submitted the following items:

- (1) a six-page closing statement;
- (2) an affidavit from the individual;
- (3) an affidavit from an Employee Assistance Program (EAP) Counselor;
- (4) an affidavit from an Alcoholics Anonymous (AA) sponsor;

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<sup>1</sup> The regulations set forth in Subpart A of 10 C.F.R. Part 710 contain the General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.

- (5) the results from ignition interlock tests for the period up to, and including, December 26, 2005;
- (6) AA attendance records and records from the individual's alcohol treatment program for the period up to, and including, January 4, 2006;
- (7) partially redacted newspaper article relating to the DOE consultant-psychiatrist who testified in Case No. TSO-0295.

## **B. The Motion to Strike**

After the DOE Counsel received the post-hearing submissions in Case No. TSO-0295, he filed the Motion to Strike under consideration. In his motion, the DOE Counsel requests that I strike the following documents or portions thereof from the record in Case No. TSO-0295: the individual's affidavit, paragraphs three through ten of the EAP Counselor's affidavit, the AA sponsor's affidavit, and the partially redacted newspaper article relating to the DOE consultant-psychiatrist. Motion at 3. Counsel for the DOE also asks that I strike from the record Part II.A.3 of the individual's Counsel's closing argument. In addition, Counsel for the DOE asks that I refuse to consider any of the material that is the subject of his Motion to Strike in my ultimate determination regarding the individual's eligibility for a DOE security clearance.

As justification for his request, the DOE Counsel argues that the individual's affidavit is repetitious and exceeds the scope of my ruling allowing the supplementation of the record. Regarding the EAP Counselor's affidavit, the DOE Counsel contends that paragraphs three through ten contain irrelevant material, go beyond the scope of what was permitted, and exceed the scope of the witness' professional expertise. As for the AA sponsor's affidavit, the DOE Counselor asserts that it, too, is repetitious and is an attempt to circumvent the hearing process by submitting testimony that cannot now be subject to cross-examination. With respect to the partially redacted newspaper article, the DOE Counsel contends that it is irrelevant, immaterial and clearly exceeds the scope of my ruling on post-hearing submissions. In addition, the DOE Counsel states that there has been no foundation laid for the redacted article in question. Finally, the DOE Counsel asks that a portion of the individual's Counsel's closing argument that relates to the subject of the partially redacted article be stricken on the same bases that he asserts for the striking of the redacted article itself.

For his part, Counsel for the individual requests that I deny the DOE's motion on the basis that Hearing Officers are afforded the utmost latitude under 10 C.F.R. § 710.26(h) in making determinations regarding relevancy, materiality and competency issues. Response at 1. Counsel for the individual maintains that the post-hearing submissions under consideration go to the issue of financial bias on the part of the DOE consultant-psychiatrist in the case.

## **II. Analysis**

The administrative regulations governing cases arising under 10 C.F.R. Part 710 give Hearing Officers "all the powers necessary to regulate the conducts of proceedings under this subpart, including, but not limited to, . . . ruling upon motions. . ." 10 C.F.R. § 710.25. Formal rules of evidence do not apply to Part 710 cases, but the Federal Rules of

Evidence may be used as a guide for procedures and principles designed to assure the production of the most probative evidence available. 10 C.F.R. § 710.26(h). The applicable regulations allow hearing officers to exclude evidence which is incompetent, immaterial, irrelevant, or unduly repetitious. *Id.* Against this background, I turn to the post-hearing submissions at issue.

#### **A. The Individual's Affidavit**

In paragraph two of her affidavit, the individual attests that the affidavit is in response to the closing statement of the DOE consultant-psychiatrist in which he expressed doubt that her risk of relapse into alcohol abuse was less than ten percent. My decision to allow the individual to update the record on her efforts at rehabilitation in no way contemplated that the individual would provide "arguments" to challenge the testimony of the DOE consultant-psychiatrist in the case. While these "arguments" may be the proper subject of the individual's Counsel's closing argument based on hearing testimony from other experts in the case, they have no place in an affidavit furnished by a lay person. Despite the expressed purpose of the individual's affidavit, however, some elements of the affidavit relate directly to the individual's efforts at maintaining her sobriety and, for this reason, will not be stricken from the record. The relevant and material portions of the affidavit are the following:

- Paragraph 3 which states that the individual is continuing to abstain from all alcohol and which recites the documentary evidence supporting her efforts at sobriety;
- Paragraph 4 which addresses the individual's use of the ignition interlock device on her vehicle, her projected time tables for the use of that device and other pertinent information about the subject;
- The first and third sentences of paragraph 6 which clarify the record by establishing the date that the individual began Step 4 of her AA program;
- Paragraph 9 which addresses the length of time that the individual expects to remain in treatment with the EAP Counselor, her psychiatrist and her aftercare Counselor.

Regarding the remaining portions of the subject affidavit, I make the following rulings. First, Paragraph 1 of the individual's affidavit is simply an introductory sentence identifying the individual as the subject of Case No. TSO-0295. It is relevant and will therefore not be stricken from the record. Paragraph 2 will be stricken from the record because it purports to establish the foundation for disputing the expert testimony of the DOE consultant-psychiatrist. Paragraph 5 will also be stricken from the record because it is akin to a closing argument that disputes the underpinnings of the DOE consultant-psychiatrist's expert opinion in the case. Several sentences in paragraph 6 will also be stricken from the record. They are: the second sentence of paragraph 6 because it is inflammatory and irrelevant, the fourth sentence in paragraph 6 because it is repetitive of testimony obtained at the hearing (Tr. at 292), and the fifth sentence of paragraph 6 because it, too, is duplicative of testimony already in the record (Tr. at 139). Paragraph 7 will be stricken from the record because the best evidence of the facts recited in this sentence is the AA literature, not the individual. The first sentence of Paragraph 8 will be stricken from the record because it expresses the individual's lay opinion about

rehabilitation in this case. The second sentence of Paragraph 8 will be stricken because it duplicates information already in the record of this case (Ex. 13 at 27). Finally, paragraph 10 is superfluous and will be stricken from the record. It requests that I recommend restoring the individual's access authorization,<sup>2</sup> a fact that is implicit from her request for an administrative review hearing.

## **B. Affidavit of EAP Counselor**

Paragraphs 1 and 2 are relevant and material to the issue of the individual's continuing rehabilitation efforts, and therefore are properly submitted in accordance with my ruling at the administrative review hearing. Paragraphs 3, 4, 6, 8, 9, and 10 contain information that is rebuttal testimony to the DOE consultant-psychiatrist's opinion in the case. These paragraphs will be stricken because they contain information outside the scope of that permitted by my ruling on post-hearing submissions. The first sentence of paragraph 5 is duplicative of testimony already in the record (Tr. at 220) and will be stricken from the record. The remaining sentences in paragraph 5 contain information that was not permitted by my ruling at the hearing and therefore will be stricken from the record. As for paragraph 7, I find that some of the information is duplicative of information already in the record (Tr. at 260, 292), while other information is simply beyond the scope of what I permitted in my ruling allowing post-hearing submissions. Paragraph 7 will therefore be stricken from the record in its entirety.

## **C. Affidavit of AA Sponsor**

Most of the information contained in paragraph 1 of the subject affidavit is duplicative of the testimony by the AA sponsor provided at the hearing and will be stricken from the record. I will allow the identification of the AA sponsor that appears in the first sentence of Paragraph 1 for purposes of identifying the affiant. Paragraph 2 is relevant to clarifying the record regarding the time period when the AA sponsor began working with the individual on the AA steps and, for this reason, will remain in the record. The information contained in Paragraphs 3 and 4 of the affidavit will remain in the record because (1) it is extremely relevant to the individual's AA rehabilitative efforts, and (2) is coming from the best source available, *i.e.*, the individual's AA sponsor. Regarding paragraph 5, I will strike the first sentence of that paragraph regarding the AA sponsor's disagreement with the psychiatric opinion of the DOE consultant-psychiatrist. The sponsor's viewpoint is outside the scope of my ruling regarding post-hearing submissions. I will allow the second and third sentences of paragraph 5 because the information contained in those sentences go to the heart of the individual's rehabilitative efforts to date.

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<sup>2</sup> The individual requests that I find her eligible for an "L" level security clearance if I determine that her "Q" level security clearance cannot be restored. This request reflects a basic misunderstanding of the Part 710 process. Access authorization is defined under 10 C.F.R. Part 710 as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). An adverse determination under Part 710 applies to all levels of access authorization, not just the level of access authorization at issue in an administrative review hearing.

#### **D. Partially Redacted Newspaper Article**

The article in question relates to information provided by the DOE consultant-psychiatrist in an unrelated case. I will strike the entire newspaper article submitted by the individual's counsel in this case because it is irrelevant and immaterial to the issues in Case No. TSO-0295.

#### **E. Portions of the Closing Statement**

In view of my decision to strike the newspaper article referenced above, I will also strike from the record that portion of the individual's counsel's closing argument that discusses the newspaper article. Accordingly, Section II.A.3 of the individual's closing argument will be stricken from the record.

### **III. Conclusion**

Based on all the foregoing considerations, I have determined that the Motion to Strike filed by the DOE on February 10, 2006 be granted in part and denied in part. Consistent with the discussion above, I will strike the following information from the record in Case No. TSO-0295:

- (1) Paragraph 2 of the Individual's Affidavit;
- (2) Paragraph 5 of the Individual's Affidavit;
- (3) The second sentence of paragraph 6 of the Individual's Affidavit;
- (4) The fourth sentence of paragraph 6 of the Individual's Affidavit;
- (5) The fifth sentence of paragraph 6 of the Individual's Affidavit;
- (6) Paragraph 7 of the Individual's Affidavit;
- (7) Paragraph 8 of the Individual's Affidavit;
- (8) Paragraph 10 of the Individual's Affidavit;
- (9) Paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 of the EAP Counselor's Affidavit;
- (10) The second and third sentences in paragraph 1 of the AA sponsor's Affidavit;
- (11) The first sentence of paragraph 5 of the AA sponsor's Affidavit;
- (12) The partially redacted newspaper article regarding the DOE consultant-psychiatrist;
- (13) Section II.A.3 of the individual's Counsel's closing statement.

Furthermore, I will not consider any of the stricken material in my decision in Case No. TSO-0295 regarding the individual's eligibility for a DOE access authorization.

Ann S. Augustyn  
Hearing Officer  
Office of Hearings and Appeals

Date: April 12, 2006